ANTHONY S. HEM DC # 342355, FW 120

WASHINGTON STATE PENITENTIARY

1313 N. 13th Avenue

Walla Walla, Washington 909362

Pierce County Superior Court

office of County Clerk

930 Tacoma avenue s. RM 110

tacoma, Washington 98402-2177

Re; Belated Statement of additional grounds for review Anthony S. Hem; No 49811-1-2

November 31st, 2017.

P/M: 12/7/17

Dear Clerk,

Enclosed is my SAG for this Court's consideration. I have served a copy of my SAG upon the prosecutor in this case. I have pending a motion for additional time to file my SAG in this court.

Please place my SAG on the courts docket for consideration.

Respectfully Submitted:

ANTHONY S. HEM

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON,
Respondant,

V.

ANTHONY S. HEM,
Appellant

No. 498-11-1-2
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, ANTHONY S. HEM, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

FELONY MURDER IS NOT ESTABLISHED BECAUSE MARISSA RICHIE WAS A ACCOMPLICE OF THE TRUCK THAT WAS INVOLVED IN A HIGH SPEED COLLISION RESULTING IN THE DEATH OF THE DRIVER MARISSA RICHIE, THAT SHE WAS A PARTICIPANT IN AND WITH.

A). Youth is a important characteristic to consider when sentencing adults under the Sentencing Reform Act, This legal theory is extended in this case based on Ms. Richie commands to Mr. Hem a younger more impressionable youth.

The Washington Supreme Court has also acknowledged the importance of considering a defendant's age as a potential mitigating circumstance in sentencing adults under Sentencing Reform Act. State v. O'Dell 183 Wn.2d 680, 689, 358 P.3d 359 (2015). O'Dell reversed a young adult's sentence and remanded for consideration of whether his youth justified a sentence below the standard range.

O'Dell 183 Wn.2d at 698-99.

O'Dell found studies of brain development "established a clear connection between youth and decreased moral culpability for criminal conduct. Id. at 695. The court endorsed the data referenced in Roper v. Simmons, 543 U.S. 551, 578, 125 S.Ct 1183, 161 L.Ed.2d 1 (2005).

In **Roper** the Court explained that because juvenile brains are not fully developed, young people who commit crimes are both less culpable and more amenable to rehabilitation than older defendants, and sentences must reflect this difference. Roper, 543 U.S. at 570.

The court endorsed the data referenced in **Roper** as well as other studies showing that "the parts of the brain involved in behavior control continue to develop well into a persons 20's.

The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car. Id. at 692 n.5 (quoting MIT Young Adult Development Project: Brain Changes. Mass. Inst. of Tec., http://hrweb.mit.edu/worklife/youngadult/brain.html(last visited Dec. 13 2016.

MS. Richie was 27 years of age and Hem was 23 years of age.

In light of recent developments, this Court shouldhold that a defendants personal characteristics, including his age, must be considered in deciding whether Ms. Richie's support and encourages criminal activity to the youthful Mr. Hem and directed to inciting or producing imminent lawless action and likely in this case incited or produced such action. **Brandenbvburg v. Ohio**, 395 U.S. 444,447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) one

may be convicted as an accomplice if he . Acting "[With knowledge that it will promote or facilitate the commission of the crime...aids or agrees to aid [another] person in planning or committing it."

The confluence of the Washington Supreme Court's decision in O'Dell and the United States Supreme Court's decisions in Roper and its progeny suggest that a defendant's young age must be considered in evaluating whether his sentence violates article I, Section 14, Although it is well-established that article I, section 14 is more protective than the Eighth Amendment, Washington courts have not yet had occasion to update the state constitutional standard in light of these significant developments. This should extend to trial counsel's argument that is, that he, Mr. Jennings, was the person who first committed the assault that led to the taking of the truck that led to the fleeing because there had been an assault and a theft which is a robbery, and that Ms. Richie was with him.

Doubt on the question was Marissa Richie a participant, was she the driver at the time of the departure from the robbery, was she a driver at the time before Mr. Hem admits to driving from Jonna's house to the collission, or whether she was just a willing participant through the course of

behaviors with Mr. Hem driving up to the point of collision.

Thus, age is highly relevant to sentencing not just for juveniles, but also for young adults. Id. (quoting Roper, 543 U.S. at 574)("[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

This proportionality should extend to felony murder.

MR. HEM'S CONVICTION FOR FELONY MURDER MUST BE DISMISSED FOR INSUFFICIENCY OF THE EVIDENCE WHERE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HE COMMITTED THE CHARGED CRIME AND THUS THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM BENCH TRIAL ARE LEGALLY INSUFFICIENT.

A challenge to the sufficiency of the evidence presented at a bench trial requires the appellate court to review the trial court's finding of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. State v Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). The Appellate Court reviews challenges to a trial court's conclusions of law de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." (Quoting **Leschi Improvement Counsel v. Wash. State Highway Comm'n**, 84 Wn.2d 271, 283, 525 P.2d 774 (1994)). "Where findings necessarily imply one

conclusion of law the question still remains whether the evidence justified that conclusion." Id.

Under RCW 9A.08.020(3)(a)(i)-(ii), an accomplice is one who, "[w]ith knowledge that it will promote or facilitate the commission of the crime...encourages or aids" another person in committing a crime. In other words, an accomplice associates himself (herself)with the venture and takes some action to help make it successful. In re Welefare of Wilson 91 Wn.2d 487, 491, 588 P.2d 1161 (1971).

More Specifically, the evidence must show that the accomplice aided in the planning or commission of the crime and that had knowledge of the crime. State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 63, review denied, 153 Wn.2d 1008 (2005).

Where criminal liability is predicated on accomplice "liability," the State must prove only the accomplice's general knowledge of his (her) co-participant's substantive crime' the state needs not prove the accomplices specific/knowledge of the elements of the co-participant's crime. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Thus, accomplice liability follows only where the State proves the accomplice has general knowledge of the specific crime the principle intends to commit, rather then general knowledge that the principal intended a crime. State v. Roberts, 142 wn.2d 471, 512-13, 14 P.3d 713 (2000)

The legislature intended to impose accomplice liability upon those having "the purpose to promote or facilitate the particular conduct that forms the basis for the charte'" and not impose such liability for conduct that does not fall within this purpose." **In personal Restraint of Sarausad**, 142 Wn.2d 690, 688, 981 P.2d 443 (1999).

The State can prove a crime either through direct or circumstantial evidence or some combination of both. See **State v. Johnson**, 159 Wn. App. 766, 774, 247 P.3d 11 (2-11)(quoting **State v Delmarter**, 94 Wn.2d at 638. (RP 408).

THE TRIAL COURT ERRED WHEN IT DECLINED TO FIND VEHICULAR HOMICIDE, MURDER IN THE SECOND DEGREE, ROBBERY IN THE FIRST DEGREE WAS INVOLVING APPELLATE HEM WAS NOT "SAME CRIMINAL CONDUCT.

The trial court erred by finding the offenses were not the same criminal conduct. Crimes encompass the same criminal conduct when the crimes require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The sentencing court's decision concerning whether multiple offenses constitute same criminal conduct is reviewed for a clear abuse of discretion or is

application of the law. **State v. Elliott**, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

In Appellate Hem's case there is no question that the: VEHICULAR HOMICIDE, MURDER IN THE SECOND DEGREE, ROBBERY IN THE FIRST DEGREE occurred at the same place and time on 5/10/2015. The offenses involved the same victims: MARISSA RICHIE & MR. SUMEY. In addition, the offenses required the same objective criminal intent. Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next. Such as when one crime furthers the other. **State v. Lessley**, 118 Wn.2d 773, 777, 8327 P.2d 996 (1992).

Mr. Hem submits that **State v. Rienks**, 46 Wn. App. 537, 731 P.2d 1116 (1987) is instructive. In **Rienks**, Division One found that the three offenses were committed as part of a recognizable scheme or plan and were committed with no substantial change in the nature of the criminal objective, and therefore encompassed the same criminal conduct within the meaning of the SRA.

Throughout the incident Mr. Hem's objective & intent was the same from one crime to the next, and the crimes further each other toward the same end.

Because the crimes of VEHICULAR HOMICIDE, MURDER IN THE SECOND DEGREE, ROBBERY IN THE FIRST DEGREE were committed at the

same time and place and involved the same victim(s) and intent, those offenses encompass the same criminal conduct. See. **RCW 9.94A.589(1)(a).** The trial court's decision to the contrary was clearly wrong. The courts failure to find that the offenses encompassed the same criminal conduct was an abuse of discretion. Accordingly, the offenses must be scored a single offense. See **Lessley**, 118 Wn.2d 773, at 781 (1992).

In this case, the state attempts to justify its "pyramiding" of the charges by the bench trial and plea the robbery was comple.

Because the trial court failed to correctly apply the anti merger statute, this matter must be remanded for resentencing.

Merger, on the other hand, is a component of double jeopardy analysis and prevents "Pyramiding the charges" to obtain greater punishment. **State v. Johnson**, 92 Wn.2d 671 (1979): See also, **State v. Vladovic** 99 Wn.2d 413, 419, 662 P.2d 853 (1983)(Citing **Blockburger v. United States**, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) and **Ehalen v. United States**, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980))).

Therefore, two crimes may constitute the same criminal conduct but may not merge. See e.g. **State vSaunders** 120 Wn. App. at 824-25. On the other hand, a crime may merge into another offense without satisfying all three predicates of the "same

criminal conduct" test. Rather, "the underlying substantive criminal offense "is more properly viewed as a species of lesser-included offense." **United States v. Dixion**, 509 U.S. 687, 688, 689, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

Merger would have required the included crime being vacated and would have prevented the imposition of multiple punishments. **Johnson, 92 Wn.2d at 682 (application of merger doctrine results in "striking" of convictions).**

A SENTENCE OF 360 MONTHS, WITH NO CONSIDERATION OF HEM'S YOUTHFULNESS AT THE TIME, AND FOR COUNSEL NOI ARGUING AND EXCEPTIONAL SENTENCE DOWNWARD, DESPITE DEFENSE COUNSEL ARGUED THE LOWER END, AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND ARTICLE I SECTION §14.

It is well-established that article I, section 14 of the h Washington Constitution is more protective than the Eighth Amendment. See State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

In **State v. Fain**, 94 Wn.2d 387, 402, 617 P.2d 720 (1980). There, our Supreme Court reversed a life sentence imposed under the former habitual offender statute because the three predicate crimes were all relatively minor, **Id.** Among other reasons, our sate constitution explicitly prohibits "cruel punishment," while the Eighth Amendment protects only against punishments that are both "cruel and unusal." **Fain** at 392-93; Const. art. I, §14; U.S.

Const. amend. VIII.

The **Fain** court looked to federal constitutional jurisprudence as a starting point. The court held our cruel punishment clause, like its federal counterpart, must be interpreted consistent with "evolving standards of decency that mark the progress of a maturing society." **Fain**, at 396-97.

A DOWNWARD SENTENCE IS WARRANTED BASED ON HEM'S REMORSE AND AGE.

The person being sentenced pursuant to SRA carries the burden of providing by a preponderance of the evidence, "that there are substantial and compelling reasons justifying an exceptional sentence" below the standard range. RCW 9.94A.535; see also former RCW 9.94A.120(2)(1992). **In re Pers Restraint of Mulholland** 161 Wn.2d 322, 328030, 166 P.3d 677 (2007).

Generally speaking such an exceptional sentence may be for a reduced term of years, for concurrent rather than consecutive sentences, or both. The fundamental question presented is whether, in light of **miller**, this statutory sentencing system is unconstitutional as applied to a juvenile offender who commits multiple homicides. **State v. Ramos**, 187 Wn.2d 420 (Oct. 2016).

In the evolving jurisprudence regarding juvenile sentencing in **Re Personal Restraint of Light-Roth**, COA No. 75129-8-1 (August 2017), Defendant, who was 19 years-old when he shot and killed a man and who argued to the trial court for a sentence at the bottom of the standard range due to his youth, is entitled to "an opportunity to have a sentencing court meaningfully consider

whether his youthfulness justifies an exceptional sentence below standard range." This collateral attack, which is the defendant's second, is neither time-barred nor successive or abuse.

In **State v. Ramirez** LEXIS 1404 (June 2015) Remirez in part requested a exceptional sentence downward due to his age.

In **State v. Murrillo** LEXIS 1043 (May 2017), The trial court commits error when it posses discretion but erroneously believes it has not discretion. Citing **Mulholland** Supra. and holding the trial court committed in sentencing based on the conduct leading to the discrete convictions constituted the same criminal conduct for the purposes of sentencing. Citing **State v. Polk**, 187 Wn. App. 380, 384 P.3d 1255 (2015), mentioned by the trial court, involved the unit of prosecution against David Polk, not his offender score.

All Hem's convictions qualify as the same criminal conduct.

In Mr. Hem's sentencing the sentencing court erroneously believed it has no discretion in Hems sentencing:

> You are a young man. you are 24. That is a tragedy that you are in this situation. **You are looking at a long prison sentence no matter what this court does...**" (RP 411 Lines- 12 through 15). The trial court went on to sentence Hem to 360 Months. (RP 442).

RCW 9.94535 provides that an exceptional sentence outside the standard range may be imposed where it is justified by

"substantial and compelling reasons...." RCW 9.94A.535. A hearing is warranted so Mr. Hem can present mitigating circumstances, established by the preponderance of the evidence.

CONCLUSION

For the reasons above Appellate asks this court to ORDER additional brieting on these Issues presented in his SAG;
To enter a order to take on additional evidence in light of Hems sentencing;
any other relief this court deems In the Interest of Justice.

DATED NOVEMBER 31st, 2017.

ANTHONY S. HEM

STATE OF WASHINGTON

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COUNTY OF WALLA WALLA)
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NO. 49811-1-2

AFFIDAVIT OF SERVICE BY MAILING

I, ANTHONY S. HEM **, being first sworn upon oath, do hereby certify that I have served the following documents:**

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Upon:

PIERCE COUNTY PROSECUTOR
AT: 930 Tacoma Avenue S.

tacoma Washington 98402

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 31st **day of** November **,** 2017 **.**

Anthony Hem #342355
Name & Number

Anthony S. Hem

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.